IN THE

Supreme Court of the United States

OCTOBER TERM—1958

No. 4

EMANUEL BROWN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

MYRON L. SHAPIRO and
J. BERTRAM WEGMAN,
Counsel for Petitioner,
60 Wall Street,
New York, New York.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully petitions for the rehearing of this Court's decision affirming his conviction for criminal contempt.[1]

Petitioner's counsel are not unmindful that the Court has given lengthy consideration to this case and do not seek rehearing to reargue what is so ably and cogently set forth in the opinion of the Chief Justice, but rejected, by a majority of this Court.

Petitioner's counsel, however, would, in their opinion, be remiss in their duty to the Court and petitioner, if

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1. This Court rendered its decision on March 9, 1959. The time under Rule 58 for filing this petition has not expired.

they did not call attention to certain basic considerations which arise because of the cast and thrust of this Court's opinion in this case.

By reason of the affirmance here and the shifting sands upon which it is bottomed, a vital conflict with other decisions of this Court has been created. This conflict can only lead to uncertainty and hazard in the administration of Federal criminal law and procedure. For this reason, rehearing is respectfully requested.[2]

I.

Although the doctrine of "purgation by oath" was finally and effectively rejected by this Court in *Clark* v. *United States*, 289 U. S. 1, 19, it has here been revived.

In that case, Mr. Justice Cardozo said that "little was left of that defense after the decision of this Court in United States *v.* Shipp, 203 U. S. 563, 574" that the doctrine "has even lost * * * the title to respect that comes of a long historical succession" and that "the time has come, we think, to renounce the doctrine altogether and stamp out its dying embers".

In spite of this unequivocal and decisive renunciation of "this intrusion or perversion of the canon law" [Holmes J., *United States* v. *Shipp*, 203 U. S. 563, 574], this Court has now breathed a smouldering life into its embers long ago thought to have been extinguished in the Federal Courts. See 41 *Harv. L. Rev.* 61; *People* v. *Gholson*, 412 Ill. 294.

Simple analysis of this Court's opinion demonstrates that by the affirmance here a life after death has been created for "purgation by oath."

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2. Since this Court unanimously disagreed with petitioner's contentions as to the immunity statute, no attention will here be given to those points.

In this Court's opinion (p. 9) it is stated that petitioner "was for the first time guilty of contempt" when he again refused to answer the grand jury's questions "upon his return to the grand jury room after the District Court had ruled on the question of immunity." Thus, we have then and there a complete crime prosecutable by notice and hearing under Rule 42(b).

But, this Court goes on to hold that the District Court could then put petitioner on the stand and afford him the opportunity to purge this completed crime of contempt by his answering the grand jury's questions before the Judge—clearly, purgation by oath and that, if petitioner refused, as he did, to purge himself, he was guilty of contempt summarily punishable under Rule 42(a).

In *United States* v. *Brewster,* 154 F. Supp. 126 [*reversed on other grounds,* 255 F. 2d 899 (C. A., D. C.)] the defendant on an indictment for contempt of the United States Senate argued that, even if he had been in contempt in refusing to answer certain questions before a subcommittee, he had nevertheless "purged" himself by subsequently furnishing the required information to the Select Committee. The District Court, holding that the contempt was criminal, stated that "the defense of purging in criminal contempt has been abolished" and that "this defense is no longer valid."

If *Clark* v. *United States, supra,* is still the law, then the decision in this case is in direct conflict therewith. If the *Clark* case had been followed in this case, this Court could not conclude that, if petitioner had answered the grand jury's questions before the Judge, he would have purged himself of his contempt before the grand jury.

Particularly apposite here, because its conflict in principle with this case is so clear, is this Court's decision in *United States* v. *Norris,* 300 U. S. 564. There, in a trial

for perjury the defense was urged that before the same tribunal the witness had retracted and corrected his falsehoods and thus his crime was purged.

This Court gave the perjurer no *locus poenitentiae*—it held the perjury complete when uttered and hence indictable and not subject to purgation.[3]

So here, too, there is and was no real place of penitence for petitioner for his overt refusal to answer in the grand jury room—unless the *Norris* and *Clark* cases, *supra*, are to be deemed overruled, in order to sustain a conviction which avoids and evades due process.

Nor is the impact of the *Clark* and *Norris* cases, *supra*, overcome or even blunted by the theory adopted by the Court here of a "continuing contempt"—more accurately described as an "open-end" crime.

The Court in holding (pp. 9, 10) that petitioner's refusal to answer before the Judge was an act "continuing [illegible] contempt" has necessarily overlooked (1) that it had held that petitioner could have been prosecuted under Rule 42(b) for criminal contempt for his refusal to answer in the grand jury room after the Court's direction to answer and (2) that under the *Clark* and *Norris* cases, *supra*, petitioner can still be so prosecuted.

It cannot be said that the crime of criminal contempt was not complete when done in the grand jury room.[4]

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3. Nor does restitution purge a larceny. *People* v. *Kaye*, 295 N. Y. 9, 13; 52 L.R.A. (N. S.) 1013, 1019, 1023.

4. It would seem that this problem may have been avoided in *Yates*, 355 U. S. 66, 74, by the holding that there was one contempt albeit a continuing one. There this Court pointed out that the conviction for the acts initiating the contempt had been reversed by the Court of Appeals (*Yates*, *supra*, 74). There being no outstanding conviction for the primary refusal in that case, the Court was able to "roll-up" or merge all the refusals into one contempt. Thus, if it were possible to reinstitute proceedings against Mrs. Yates for her first refusal to answer, she would have a defense of former jeopardy. Here petitioner can have no such defense—as the Court has made it especially clear that his refusal in the grand jury room was prosecuta-

If that were so, this Court could not say, as it did (pp. 9, 10) that petitioner could be prosecuted for the refusal in the grand jury room. The crime could not be both complete and incomplete.

There necessarily had to be two contempts—the one before the grand jury and the one before the Court. The contempt before the grand jury was an entirely separate crime from the contempt before the Court, of which he was convicted. But petitioner by the affirmance here on the theory of continuing contempt stands convicted of a crime other than either one of the two which he may have committed.

The certificate of the Trial Judge makes this indisputable. In no way does the certificate show that petitioner was convicted below for continuing before the Court his overt refusals before the grand jury.

This certificate (R. pp. 4, 5) makes no reference whatsoever to the proceedings before the grand jury, after the Court's direction to petitioner to answer the questions. It recites (R. p. 5) merely that the petitioner was brought before the Judge and that in the presence of the grand jury, the Judge put the questions to him, that he refused to answer after having been directed to do so, that he failed to state any valid reason why he should not be held in contempt, and that accordingly petitioner was summarily found to be in contempt of Court under Rule 42(a).

Then this Court, in order to avoid the problem of multiplication of contempts clearly inherent in this case,

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ble, but under Rule 42(b). Nor has the Court held that petitioner's refusals to answer both before the grand jury and the District Court were together a single contempt. If the Court had so held, then unlike the continuing contempt in Yates, where all phases occurred in the actual presence of the Court, the prosecution here would have had to be under Rule 42(b) as a portion of the contempt did not occur in the presence of the Court, but in the grand jury room.

describes the crime as a continuing contempt. But for this so-called continuing contempt petitioner was not convicted. If he had been convicted of this continuing contempt, then the certificate would have had to recite the proceedings before the grand jury. This it very carefully does not do. The Assistant United States Attorney who prepared the certificate (R. p. 50) and the District Court Judge who signed it were undoubtedly well aware of the fact that to include the grand jury proceedings in the certificate would necessarily invalidate it, because then, as pointed out by this Court, there would have had to be proceedings under Rule 42(b) and the error would appear plainly on the face of the certificate.

Accordingly, if this Court means to supply the defect in the Rule 42(a) procedure here by adding to the certificate the matter contained in the Record as to the proceedings before the grand jury, then the certificate as so amended *ad hoc* is invalid and the conviction must fall. There would seem to be no disagreement in this Court about this basic rule that, if the proceedings resulting in a contempt took place before a grand jury in its room, then Rule 42(b) must be applied.

And this is a basic distinction between this case and *Yates*, 355 U. S. 66. There the continuing contempt occurred before the same tribunal.[5] Here, while the grand jury concededly is an appendage of the Court, proceedings before it are not the same as proceedings before the Court, and for the Court to take cognizance of contumacious conduct before the grand jury, proceedings under

5. Moreover, while in the *Yates* case, *supra*, the adjudication was ostensibly under Rule 42(a), Mrs. Yates was given oral notice of her prospective adjudication of criminal contempt (*Ibid*, 69) and a certificate equivalent to specifications as required by Rule 42(b) (*Yates*, 227 F. 2d 851, 852) was filed by the Trial Judge and a month later she received a hearing whereat she was present and represented by counsel (*Yates*, 227 F. 2d 851, 852); only after this hearing was completed, was Mrs. Yates adjudicated in contempt.

Rule 42(b) must be instituted. By the device of labeling the petitioner's refusal to answer before the District Judge as a continuation of the contempt before the grand jury, this basic difference cannot be obscured.

Even if this Court, by describing the petitioner's refusals as a continuing contempt, intends to imply that the proceedings before the Court were a continuation of the grand jury proceedings, the error is not cured thereby, because what transpired before the grand jury took place outside of the presence of the Court, and in this phase of the contempt petitioner was certainly entitled to notice and hearing. Thus, the "rollup" or merger of the refusal before the grand jury into the alleged contempt before the Court which is implied in this Court's phrase "finally adjudicating" (Op., p. 11) is impossible.

In sum, this Court holds that petitioner's conviction can stand because he refused to purge himself, when as matter of law long settled by this Court, he could not have purged himself of his contempt in the grand jury room. By answering before the Court he could at the most only avoid a coercive sentence or mitigate his punishment for his contempt before the grand jury. *Wilson* v. *United States*, 65 F. 2d 621 (C.C.A.) 3; *United States* v. *Collins*, 146 Fed. 553, 554.

Petitioner thus faces not only an inordinately lengthy sentence but also what is in substance and fact double jeopardy for the same contempt—a necessary consequence of the multiplication of contempts sanctioned here.[6]

II.

In holding that petitioner's refusal before the District Judge to answer the grand jury's questions "left the

6. The improbability or slight possibility of prosecution for the other contempt is no solution for petitioner's "awkward" situation. Cf. *United States* v. *Miranti*, 253 F. 2d 135, 138, 139 (C. A. 2).

Court no choice" but to convict him of criminal contempt under Rule 42(a), this Court has overlooked, it is respectfully submitted, the power in the District Court to commit the petitioner until he make answer to these questions.

At page 8 of its opinion, this Court in restating petitioner's argument asserts that petitioner argued that on his disobedience to the Court's order in the grand jury room the District Court had no choice but to initiate criminal contempt proceedings against him at once under Rule 42(b). This, it is respectfully submitted, is not petitioner's contention.

It is petitioner's contention that for the contempt committed in the grand jury room, he could only be prosecuted and punished under Rule 42(b), but that for the purpose of obtaining his answers to the questions and aiding and assisting the grand jury to that end, the District Court only could commit him until he should make answer thereto. Petitioner has not sought here to have the Court create a vacuum of power and he does not deny the District Court's coercive power to commit him until he make answer. Petitioner does contend that he could not and should not be convicted summarily of criminal contempt under Rule 42(a) for not having answered the grand jury's questions before the District Court.

This Court to justify its upholding of this abuse of the summary contempt power, has cited a number of decisions of this Court and the Courts of Appeals as "at least *sub silentio*" approving "such a procedure" which its opinion describes as "stemming * * * from usages of the common law."

Of the cited cases decided in this Court, not one, openly or silently, furnishes such approval of such summary procedures culminating in punitive sentences for contempt.

In *Hale* v. *Henkel*, 201 U. S. 43, 46, the coercive order of the Circuit Judge committed Hale "to the custody of

the Marshal until he should answer the questions and produce the papers". Similarly, in *Wilson* v. *United States*, 221 U. S. 361, 369, 371, the commitment was to the custody of the Marshal until the witness shall perform the required acts. In *Curcio* v. *United States*, 354 U. S. 118, this Court did not approve the procedure there followed and necessarily did not consider that issue, because its sustaining of the Fifth Amendment plea disposed finally of the case. Besides there the 6 months sentence contained a blanket purge provision.

Much is attempted to be made of *Rogers* v. *United States*, 340 U. S. 367, in the Court's opinion here, page 10, footnotes 13 and 14. Because of this, petitioner's counsel have reread the petition for rehearing in the *Rogers* case and we respectfully submit to this Court that all that was presented on the procedural question in that case was whether that petitioner had a right to counsel in a Rule 42(a) proceeding and whether that right to counsel had been infringed by the summary proceedings there followed. The fundamental questions presented in this case were not at all submitted to the Court in the *Rogers* case. To show that only the right to counsel was involved in the *Rogers* case, it is necessary only to quote from the next to last sentence of that petition for rehearing, at page 11. This sentence is, "We hope and trust that this court will listen to our plea against this apparent denial by the trial court of so basic a right as the right to be heard by counsel before pronouncement of judgment."

Lopiparo v. *United States*, 216 F. 2d 87, is one of the Courts of Appeals cases cited by the Court as representing approval of the summary contempt procedure followed here. There, however, sentence was not to the penitentiary, but to the custody of the Marshal for 18 months or until the further order of the Court should the contemnor produce before the grand jury the required records

before the expiration of the sentence or the discharge of the grand jury—in effect, a coercive sentence.

In *United States* v. *Weinberg*, 65 F. 2d 394, while the sentence was for a determinate period, the contemnor unlike this petitioner was prosecuted on presentment by the grand jury.

As to the earlier practice at common law, the cited case of *People ex rel. Phelps* v. *Fancher*, 4 Thompson & Cook 467, involved a commitment until the witness should answer. *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74, is also to be distinguished because it is quite clear that the Court of Appeals held on the record there that the relator had waived all procedural issues "in order to have a prompt determination of the constitutional question involved."

In *Re Belle Harris*, 4 Utah 5, the Court there exercised the power of coercion by committing the witness until she should answer the questions. Besides, this case arose under the Utah Territory statute and not at common law.

In overlooking this clear and unmistakable power of the Court to commit the petitioner until he make answer to the grand jury's questions, this Court has been led into the error of sanctioning a procedure wholly violative of due process and totally inconsistent with its statement of the purpose of summary proceedings before the Court.

At page 9 of its opinion, this Court says that a "judge more intent upon punishing the witness than aiding the grand jury in its investigation might well have taken" the course of instituting prosecution of petitioner for criminal contempt under Rule 42(b), but instead the District Court "made another effort to induce the petitioner to testify."

The punishment under the Rule 42(a) proceeding being deemed punitive and not coercive, how can it be said on the one hand that the Court was seeking to induce the petitioner to testify and on the other hand not seeking to punish the witness? The necessary sequel to this

Court's statement that the intent of the District Court in pursuance of a proper attitude was to induce the petitioner to testify would necessarily have been for the Court to exercise its coercive power and to commit the petitioner until he answer the grand jury questions and not to conduct proceedings under Rule 42(a).

While it would seem that the Court's statement is intended to be a rephrasing in the terms of this case of certain language in *Yates* v. *United States*, 355 U. S. 66, 75, the proceedings in this case do not at all accord with the phraseology of *Yates*. There, Mr. Justice Clark said, "The more salutary procedure would appear to be that the court should first apply coercive remedies in an effort to persuade a party to obey its orders and only make use of the more drastic criminal sanctions when the disobedience continues." Here, however, there was no imposition of coercive remedies, only a substitution of the more drastic criminal sanctions for the coercive remedies.

If the District Court had applied the coercive remedies and no answers resulted within a reasonable time, it still remained open to commence a prosecution of the petitioner under Rule 42(b) for his overt refusal in the grand jury room.[7] But the District Court did not apply any coercive remedies, and thus in reality proceedings inconsistent with this Court's expression in the *Yates* case, *supra*, have been here sanctioned.

III.

On the question of the sentence here, this Court first states that the length of sentence "is one primarily for the District Court, to be made 'with the utmost sense of

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7. The coercive sentence, if one had been given, would then, unlike the instant punitive sentence, present "no double jeopardy problem." *Yates* v. *United States*, 355 U. S. 66, 74. See fn. 4, *supra*, p. 4.

responsibility and circumspection'" and then that the "record does not indicate that the district judge's decision was otherwise reached". This circumspect negative statement by the Court is, indeed, indicative of the fact that the record does not at all show that the district judge had in mind his obligation to use the utmost sense of responsibility and circumspection or that he did so act.

The key to the Court's attitude is indicated by the Record on the question of bail (R. pp. 49-51).

CONCLUSION

For all of the above, rehearing should be allowed and the conviction reversed.

Respectfully submitted,

MYRON L. SHAPIRO and
J. BERTRAM WEGMAN,
Counsel for Petitioner.

By MYRON L. SHAPIRO

Myron L. Shapiro

Certificate

It is hereby certified that the foregoing petition for rehearing is presented in good faith and not for delay.

MYRON L. SHAPIRO

Myron L. Shapiro,
Of Counsel for Petitioner.